

191—140.8 (523I) Distribution of capital gains using a total return distribution method.

140.8(1) The principal of a care fund is intended to remain available perpetually as a funding source for care of the cemetery. The principal of a care fund shall not be reduced voluntarily and shall remain inviolable, except for the distribution of income. This rule is intended to encourage investments in appreciating assets that will produce higher income levels created by growth in trust principal. Pursuant to Iowa Code section 523I.811(2), a trustee or, in the event of multiple trustees, a majority of the trustees, may, in the trustee's or trustees' sole discretion and without approval of the court, adopt a total return distribution method, subject to the terms and conditions of this rule.

a. The trust's governing instrument must clearly manifest intent to use a total return distribution method. Conversion to an investment policy utilizing the total return distribution method shall not conflict with or affect any provision of the trust agreement, if any, regarding the distribution of principal. If the trust agreement indicates intent that net appreciation shall not be expended, the trust may not use the total return distribution method unless the trust agreement is amended appropriately.

b. Distributions permitted under the total return distribution method shall be paid in the following order:

- (1) Net income as normally defined;
- (2) Other ordinary income as determined for federal income tax purposes;
- (3) Assets of the trust principal for which there is a readily available market value; and
- (4) Other trust principal.

c. A separate accounting of principal and income shall be maintained for the care fund.

d. The distributions under the total return distribution method shall be used in any manner determined to be in the best interests of the cemetery if authorized by a resolution, bylaw, or other action or instrument establishing the care fund, including but not limited to the general care of memorials, memorialization, cutting and trimming lawns, shrubs, and trees at reasonable intervals, maintaining drains, water lines, roads, buildings, fences and other structures, maintaining machinery, tools, and equipment, compensating maintenance employees, paying insurance premiums, making payments to employees' pension and benefit plans, paying overhead expenses incidental to such purposes, paying expenses necessary to maintain ownership, transfer, and interment records of the cemetery and capital improvements.

e. The trustee or trustees shall, not less than annually, determine the fair market value of each asset of the trust that consists primarily of real property or other property that is not traded on a regular basis in an active market, by appraisal or other reasonable method or estimate. That determination, if made reasonably and in good faith, shall be conclusive as to all persons interested in the trust.

140.8(2) The trustee or trustees shall exercise ordinary business care and prudence under the facts and circumstances prevailing at the time of the action or decision regarding the investment of trust funds. In so doing, the trustee or trustees shall consider present and anticipated financial requirements of the cemetery, including the following: the cemetery's need to fund the current expenses of care and maintenance and the cemetery's long-term need to fund the expenses of care and maintenance; expected total return from income and appreciation of principal; price level trends of equity and fixed income investments; needs for liquidity; regularity of income; preservation or appreciation of capital; general economic conditions; the possible effect of inflation or deflation; and the retention of income and net appreciation to adjust for inflation.

140.8(3) A notice of intent shall be filed with the division 90 days prior to implementation of the total return distribution method. The notice shall include a copy of the trust governing instrument and the written election adopting the total return distribution method.

140.8(4) The trustee or trustees must, prior to implementation of the total return distribution method, adopt a written investment and distribution policy under which future distributions from the trust will be total return distribution amounts rather than net income distribution amounts. A copy of the investment and distribution policy shall be filed with the notice required by subrule 140.8(3). The investment goals and objectives shall be to achieve the following: principal growth through equity investment; current

income through income investments; and an appropriate balance between (1) maintaining purchasing power through principal appreciation and (2) generating current income to support the cemetery's current care and maintenance. The trustee or trustees shall treat the net appreciation, realized and unrealized, in the fair value of the assets of a care fund as if it were net income of the trust for purposes of determining the amount available for distributions, from time to time, from the care fund.

140.8(5) In addition to the annual report required by Iowa Code section 523I.813, a perpetual care cemetery using the total return distribution method shall file an annual report with the division about the trust, detailing the asset allocation, the annual payout, any changes in investment policy, an accounting in regard to whether growth of the care fund's trust principal has exceeded an amount needed to compensate for inflation, and other pertinent information.

140.8(6) The division may limit or prohibit the distribution of capital gains in situations where investment returns and distribution practices have not resulted in sufficient protection of the care fund's trust principal from either a middle-term (three to five years) or long-term analysis. The division's review shall consider the presence and stated value of assets that do not have an active market and are not traded on a regular basis, the frequency of appraisals and evaluations, the asset allocation of the trust, and whether trust principal, as adjusted for inflation, is less than it was at the time the cemetery converted to the total return distribution method.

140.8(7) The annual payout shall not exceed the greater of the net ordinary income or 5 percent of the fair market value of the care fund as of the last day of the trust fiscal year immediately preceding the distribution year, unless approved by the division upon a showing of good cause. The determination of payout amounts shall take into consideration the cemetery's need to fund both the current and future expenses of care and the maintenance and preservation of principal. In determining the amounts to be paid out annually, the following factors shall be taken into account: the perpetual duration of the care fund; present and anticipated financial requirements; expected total return from income and appreciation of principal; price level trends of equity and fixed income investments; needs for liquidity; regularity of income; preservation or appreciation of capital; general economic conditions; the possible effect of inflation or deflation; and the retention of income and net appreciation to adjust for inflation.

140.8(8) The trustee or trustees shall maintain records documenting the net fair market values of the assets held in trust at the end of the accounting period immediately prior to adoption of the total return distribution method.

140.8(9) The fair market value of the trust shall be determined at least annually, using such valuation date or dates or averages of valuation dates as are readily ascertainable. Reasonable and appropriate valuation methods shall be utilized. As appropriate, assets may be excluded from valuation, provided all income received with respect to such assets is distributed to the extent distributable in accordance with the terms of the trust agreement.

140.8(10) The asset allocation of the care fund shall include a diversified portfolio, and investment decisions shall be made in accordance with Iowa Code section 633A.4302.

140.8(11) The division may limit or prohibit adoption of a total return distribution method by a care fund if the trustee or trustees and any investment manager are not able to demonstrate sufficient knowledge and expertise regarding effective implementation of the total return distribution method.

140.8(12) The election of use of a total return distribution method is irrevocable, unless a reversion is approved by the division. A notice shall be filed with the division 90 days prior to a proposed reversion from the total return distribution method to the traditional net income distribution method. The division may prohibit a reversion from the total return distribution method to the traditional net income distribution method if the trust principal, as adjusted for inflation, is less than it was at the time the cemetery converted to the total return distribution method.

This rule is intended to implement Iowa Code sections 523I.207 and 523I.811(2).